



DPS TRAINING BULLETIN

LEGAL BULLETIN NO. 323

February 22, 2008

CERTAIN PROVISIONS OF THE ALASKA VICTIMS' RIGHTS ACT ARE UNCONSTITUTIONAL

Reference: State of Alaska and
Alaska Office of Victims' Rights
v.
John M. Murtagh

Alaska Supreme Court
Opinion No. 6177
_____P.3d_____
October 26, 2007

FACTS:

Murtagh and other criminal defense attorneys challenged certain provisions of the Victims' Rights Act of 1991 (AS 12.61.120) as written. The Act regulates criminal defense representatives' conduct with respect to pretrial interviews of victims and witnesses. In all cases, before defense representatives may interview a victim, they must: 1) state their identity and their association with the defendant; 2) tell the victim that the victim need not talk with the representative; 3) tell the victim that the victim may have a prosecuting attorney present during the interview; 4) inform the victim that they are being recorded. Murtagh challenged these requirements except the requirement that representatives (#1) reveal their identity and association with the defendant.

Murtagh challenged additional constraints imposed by the Act. The relevant portions of the challenged provisions are:

- Bar defense representatives from contacting a victim or a witness who has informed the defendant or defendant's counsel in writing that the victim or witness does not wish to be contacted by defense representatives.
- Require defense representatives to obtain written authorization from a victim or witness before an interview may be recorded. The authorization must state that the victim or witness is aware that there is no legal requirement that he or she talk to

the defense representative and that he or she may have a prosecution representative present during the interview.

- Require defense representatives to obtain written authorization from a victim or witness before "obtain[ing] a statement . . . not taken as a recording." The authorization must state that the victim or witness is aware that there is no legal requirement that the victim or witness talk to the defense representative.

If an attorney or a person subject to an attorney's control (i.e. defense investigator) violates the statutory constraints relating to interviews of victims and witnesses in sexual offense cases, the court must refer the incident to the Disciplinary Board of the Alaska Bar Association as a grievance. Statements taken in violation of this statute are presumed inadmissible.

ISSUE:

Do certain provisions of the Alaska Victims' Right Act violate Alaska's constitution?

HELD: Yes - - the guarantee of due process protects a criminal defendant's right to prepare and present a defense - - having reasonable access to witnesses is an essential part of this right. Witnesses do not belong to either party.

REASONING:

1. A rule promulgated by this court (Alaska Supreme Court) prohibits both prosecution and defense representatives from advising witnesses to refrain from discussing a case with opposing representatives or "otherwise imped[ing] opposing counsel's investigation of the case." (Alaska R. Criminal P. 16(d).

2. Requiring a defense representative to give unsolicited advice to victims and witnesses that they are not required to talk to the representative and may have a prosecutor present if they do conveys an implied suggestion to prospective interviewees that it would be best if no interview were given.

3. Requiring the additional step of written consent in the context of a defense interview only serves to underline a message that cooperation with the defense is undesirable.

4. Witnesses and victims have the same right to decline to be interviewed by police and prosecutors as by defense representatives. Likewise witnesses and victims have the right to give such interviews only in the presence of defense representatives or other persons.

5. A person's privacy interests are no more violated when a defense representative records such a conversation without disclosing that he is recording it than in the case of an undisclosed recording by a police officer. ". . . what we said in Quinto concerning the absence of a reasonable expectation of privacy of a person speaking with a known police officer investigating a crime applies equally to a person speaking to a known defense representative conducting an investigation." (emphasis added.) (Quinto, see Legal Bulletin No. 83.)

6. We emphasize that AS 12.61.120(c)(1) and AS 12.61.120(d)(1) require that defense representatives identify themselves and their specific association with the defendant when they seek to interview crime victims and witnesses. If defense representatives fail to make these disclosures, or engage in deceptive or misleading tactics, they are subject to sanctions by the trial court.

7. Undisclosed recording is as valuable for defense representatives as it is for the police and that the objections to it are of little weight when compared to its benefits.

NOTES:

Under Alaska constitutional due process clause (Article 1, Section 2) the court stated: "[t]he guarantee of due process protects a criminal defendant's right to prepare and present a defense." In this opinion, insofar as it pertains to allowing defense representatives to surreptitiously record victims and witnesses the court cited several cases: State v. Glass (see Legal Bulletin No. 16) where the court suppressed surreptitiously recorded conversations taken by an undercover officer; Juneau v. Quntio (see Legal Bulletin No. 83) where there is no expectation of privacy when talking to a police officer; and Stephen v. State (see Legal Bulletin No. 99) requires mandatory recording of a person who is in custody.

This opinion is 52 pages in length. We have attempted to give you the essence of it. You may want to go on line and read it in its entirety or contact your local district attorney's office for an additional briefing.

NOTE TO SUBSCRIBERS TO THE ALASKA LEGAL BRIEF MANUAL:

File Legal Bulletin No. 323 numerically under Section R of the manual.